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Council of Canada

Indian Act Secretariat

Bill C-31 & The New Indian Act

Guidebook #2:

PROTECTING YOUR RIGHTS

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Foreword

On behalf of the Native Council of Canada and its twelve provincial and territorial affiliates, we are pleased to make this booklet on the *Indian Act* available to those in need of assistance and information in protecting their rights, especially their rights to registered status and to band membership under the new *Indian Act.*

This is the second guidebook in the NCC's series on the *Indian Act*. The first guidebook provided background information on the changes to the *Indian Act* brought about by the passage of Bill C-31 in June of 1985. This guidebook explains some of the more technical issues you may face in applying for status or band membership under the *Indian Act*, and provides guidance on how to make sure that your rights are respected.

It is important to remember that when protecting your rights under the law, it is always advisable to seek the help of a lawyer. This booklet can only provide you with a basic guide on how to protect your rights in the more common cases that are likely to arise. There are many special circumstances, however, that require expert counselling. The assistance of a lawyer and of a Native organization (listed on the back page of this booklet) is always recommended if you are planning on taking legal action to defend your rights.

We hope that you will find this booklet of use, and we encourage you to contact the Native Council of Canada or the NCC affiliate in your area for further information or assistance.

Native Council of Canada

November, 1986

Ottawa

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PART I

BILL C-31 ONE YEAR LATER

It has now been seventeen months since Bill C-31 was passed by Parliament to amend the *Indian Act*, and about a year since the process of reinstatement has been fully underway. Two major lessons have been learned to date. First, the complexity of the new *Indian Act* has led to a lot of disagreement over what the various sections of C-31 mean and how they should be interpreted for purposes of registering applicants. Many of the issues that everyone thought were resolved by C-31 have re-emerged, and in many cases the promises of C-31 have proved to be hollow ones.

Secondly, implementation of C-31 has been very slow and controversial. Based on the average monthly capacity to date of the the Department of Indian Affairs and Northern Development (DIAND), backlogs in the reinstatement and registration process may now require as long as seven years to process. Only a handfull of bands have adopted membership codes and this fact raises the possibility that there may be a sudden last-minute rush to adopt codes before June of 1987. Some of the band codes developed to date appear to deny fundamental Indian rights. In other cases, a few bands have attempted to pass controversial residency rules to keep reinstated people from living on reserve or becoming effective band members.

Before June 28, 1987, the Minister of Indian Affairs must report to Parliament on the implementation of Bill C-31. When the Minister does this, a committee of Parliament will be formed to assess the Minister's report and review C-31 and its impact. Unfortunately, seventeen months after Bill C-31 was passed, we are still a long way from having enough information for a proper review. We do know that the *Indian Act* must be amended again, and the Native Council of Canada has already identified some of the changes that should be made. The implementation of C-31 has been so haphazard and slow that it will be difficult, even by June of 1987, to formulate a detailed and accurate picture of the impact of C-31 and the further changes to the *Indian Act* that are required.

The remainder of this section provides an update on events, including efforts to interpret Bill C-31, the progress of registration, and the degree to which bands have developed membership codes and related by-laws.

Making Sense of the new *Indian Act*

When the *Indian Act* (the Act) was amended by Bill C-31 on June 28, 1985, it resulted in two major changes to the Federal system of registration and band membership:

- It ended some of the discrimination in the old *Indian Act* and allowed for the reinstatement and first time registration of some of those people who were previously denied status and/or band membership; and,

- It changed the meaning of Status and Band Membership by altering the way people can pass on and obtain status while giving federally recognized Indian bands the opportunity of controlling their own membership.

Since passage of the Act, the Native Council of Canada has met repeatedly with Departmental officials to clarify areas of confusion, to attempt to speed-up the registration process, and to begin the task of interpreting the meaning of this complex legislation and how it should be implemented by applicants, the Department, and by bands. To date, the NCC has indicated dozens of problems with key sections of the legislation and how they are interpreted.

Key Interpretation Issues

- How to interpret the Act to avoid unnecessary sexual discrimination;

- How band codes are reviewed by the Minister and what the procedural requirements for adopting band codes are, including who can participate, what "consent" means, and what kind of "notice" is appropriate;

- To what extent bands can restrict residence of reinstated members;

- What band benefits can be withheld from people who are affected by the "$1,000 rule" in section 64.1(2);

- Why band codes have not been made public to date by DIAND, as required by law;

- Retroactivity of benefits and rights under the Act, and what dates are applicable;

- How adoption and citizenship affect entitlement;

- How specific legal rights and program benefits for status Indians un-connected with bands are to be implemented (e.g. tax, education, and health benefits); and,

- How DIAND interprets the connection between status, band membership and DIAND's administration of Treaty entitlements.

While the NCC is attempting to negotiate a common interpretation of C-31 with DIAND, some issues may have to go before the courts to be resolved. This is particularly true for access to Aboriginal and Treaty rights and in the case of continuing sexual inequalities which the Act still seems to promote.

Update on Registration

The implementation of Bill C-31 has turned out to be a nightmare of delays, revisions and controversial decisions on entitlement.

By the end of September of 1986 fewer than 15% of the persons who had applied for registration had been registered. Based on the first 15 months of experience up to the end of September, DIAND has been completing an average of only 33 registrations per day. However, over the same period DIAND received applications from about 225 people a day. Many of the over 75,000 people who had applied by the end of October have already waited for over a year for registration. At these rates, people may face as long as seven years to have their applications processed.

Obviously, such delays are unacceptable. DIAND has added more staff to it's reinstatement effort than had been originally planned, and this is increasing the pace of registrations. However, at the same time funding for participation by Native associations in the implementation work has been cut-off mid-stream. As a result, many people feel that the process is being deliberately underfunded and under-resourced so as to deny Indians their legal rights.

To complicate matters, confusion over the meaning of C-31 is increasingly leading DIAND registration officials to go back to previously processed applications and re-do the work all over again. In addition, about **one out of every six applicants processed so far has been rejected**, which means that very large numbers of protests can be expected.

By far the majority of registrations that have occured have been the easily documented cases of "12(1)(b) women" (who lost status by marriage to a non-Indian or a non-registered Indian) and their first generation children. As the process goes on, the time and work required to register the more difficult cases will increase, especially for the NCC and its affiliates trying to help applicants through the process. Charts I and II (next page) provide a picture of where the registration process was at the end of September.

Chart I
Registration Backlog

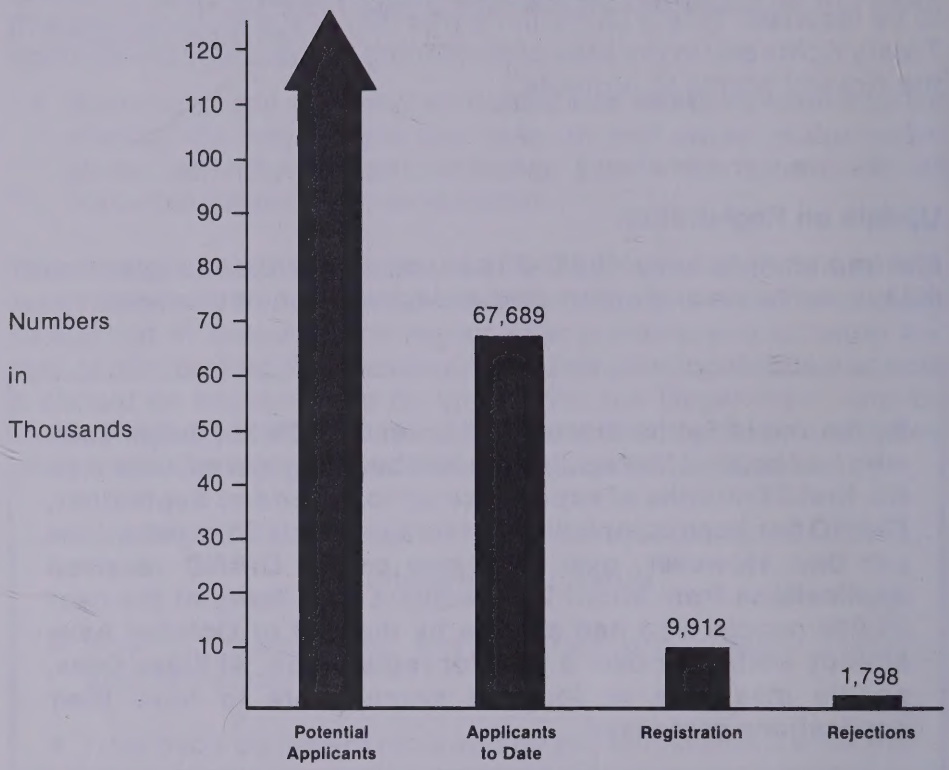


Chart II
Registration by Type of Status under C-31

	6(1)(a)	6(1)(b)	6(1)(c)	6(1)(d)	6(1)(e)	6(1)(f)	6(2)	Totals	Rejections*
Atlantic	17	0	267	25	0	19	570	898	103
Quebec	27	0	480	2	0	32	1043	1584	292
Ontario	37	0	986	189	2	148	1350	2712	554
Manitoba	2	0	345	55	0	30	404	836	164
Sask.	5	0	350	59	0	7	475	896	159
Alberta	16	0	533	32	0	36	787	1404	219
B.C.	18	0	455	96	0	92	508	1169	275
Yukon	5	0	113	27	0	8	166	319	29
N.W.T.	0	0	40	10	0	4	40	94	3
Canada	127	0	3569	495	2	376	5343	9,912	1,798

Source: DIAND Membership Entitlement Unit, October 1986. All data are as of September 30, 1986.

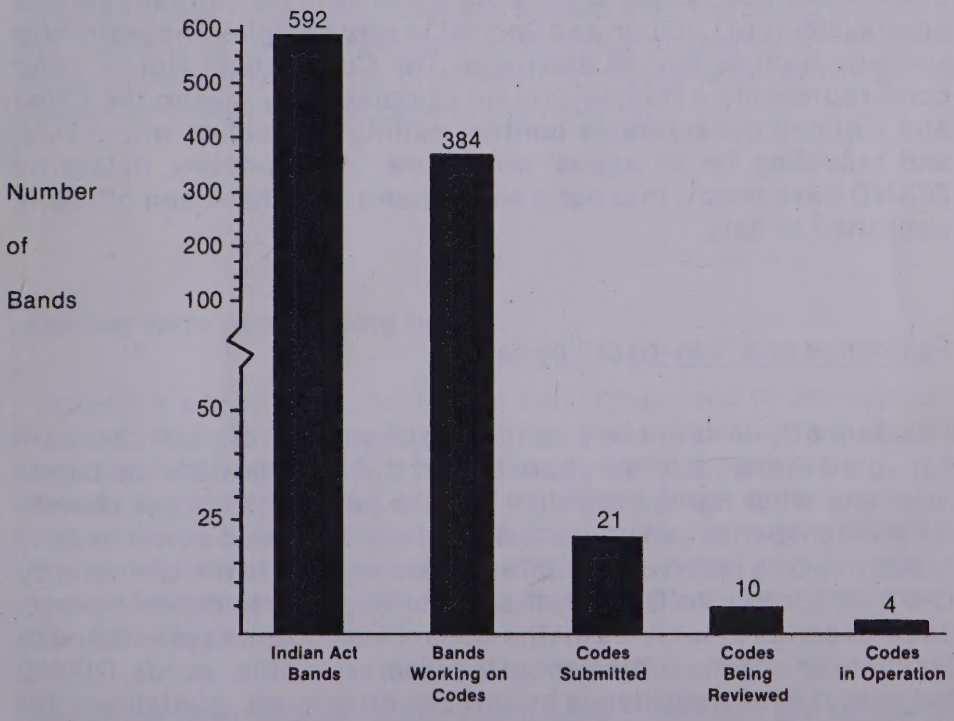
* Includes 3 categories: applicants rejected due to supposed non-entitlement; duplicate applications and those by persons already registered.

Band Code Update

Although over 380 of the country's 592 *Indian Act* bands have received funds for developing codes, to date only 21 bands have forwarded some kind of membership system to DIAND. Only four bands have actually received Ministerial recognition of control.

DIAND does provide funding to bands to develop and implement band membership codes and to date about $2.5 million has been released for these purposes. A minimum of $7,000 per band is provided for developmental purposes, and additional funds, depending on band size, for implementation (a minimum of $5,500). Some NCC affiliates are also being asked to prepare "model" band membership codes for use by bands. However, DIAND has so far refused to provide NCC affiliates with resources to address the band membership concerns of their constituents.

Chart III
Band Code Development
November, 1986



Notes: 1. 384 Bands have received funding for the development of codes. Only 2 bands have received funds for implementation of codes.
2. Of the 21 "Codes" sent to DIAND to date, 7 are not in a form that DIAND can consider, 10 are being considered, and 4 have been implemented.

Source: DIAND Membership Entitlement Unit, November 30, 1986.

Bands Taking Control over Membership

The band codes passed to date have been developed under extra-ordinary circumstances. Of the four bands that have had their codes recognized so far, one is a small, wealthy band (Sawridge) and one, Sechelt, had to pass a code to have it up and running before its special self-government legislation was passed earlier this year. The Lubicon band in Alberta and the Cumberland House band in Saskatchewan are also somewhat unique. Cumberland House faces a situation where the community of 200 is adjacent to a non-Status/ Métis community of some 700 with the latter community now seeking the creation of a new Band. Lubicon is a band which had seen almost half of its members arbitrarily dropped from its band list. It has aboriginal title to its traditional territory but no reserve lands, and is in the midst of a major battle with the federal government since the Lubicon people demand lands based on their real membership, not on the DIAND band list before C-31.

In other words, the band codes passed to date may represent exceptions rather than the rule.

The band codes passed cover a full range from the fairly simple and open systems of Lubicon and Sechelt to very complex and restrictive systems such as that of Sawridge. The Cumberland House band code represents a middle-ground of complexity, giving the Chief and Council considerable control, setting a blood-quantum rule, and providing for an appeal procedure. Unfortunately, delays by DIAND have meant that not a single band code has been officially published to date.

Residence and "pay-back" by-laws

Residence by-laws are very controversial and a lot of court cases are expected in the next few years to sort out what powers the bands have and what rights individual Indians have. It is not yet clear to what extent bands can utilize this federally delegated power to deny residence on a reserve to people who are entitled to membership by C-31. According to DIAND, the power to pass residence by-laws enables bands to set rules for the issuance of location permits and to facilitate an orderly settlement of the reserve. In other words, DIAND believes that all a residence by-law can do is to set "guidelines" for residence. Residence by-laws cannot exclude residence where there is a right of residence in the Act, and bands cannot allow for residence of non-members by entering into agreements without Ministerial allowance. The power to pass residence by-laws is subject to Ministerial veto under section 82(2) of the Act, whereas a membership code is not.

So far, DIAND has rejected most residence by-laws passed by bands. However, four residence by-laws have been passed and allowed, at least one of which may prohibit persons from residing on reserve who were not actually residing prior to C-31 or who are entitled to band membership by virtue of reinstatement. Until the courts hear an appeal on such arrangements, we have no way of telling whether DIAND's acceptance of such rules is valid.

According to DIAND, no bands have passed by-laws under section 81(1)(p.4) to bring the "$1,000 rule" allowed under s. 64.1(2) into effect. The result of such a by-law would be to require persons regaining band membership to pay the band an amount of money equivalent to whatever amount over $1,000 they had earlier received upon enfranchisement, plus interest. Until a person affected by such a by-law pays the band the money concerned, that person is not entitled to participate in a long list of benefits given to individuals as the result of expenditures of band funds. The trouble is that since C-31 is so vague on this matter, there is dispute over what benefits the band can actually deny to reinstated members. Generally however, individuals affected by such by-laws cannot expect to participate in any individual benefits such as band financed loans and band financed housing. However, persons affected by these by-laws should make sure that any benefit they are being denied is not something that DIAND is contributing money to or which is being provided for the use of all band members (such as the use of roads and buildings or access to the reserve).

Schooling

Another Note About Being Indian

"Indian" is a term that Christopher Columbus used to describe the Arawak and Carib people when he came across them in the Caribbean 500 years ago. It was not a word that the Arawak or Carib people suggested he use. He just thought he was on the coast of India. He was wrong. But that didn't stop people from using the word "Indian" to describe anyone who was "indigenous" or "aboriginal" to the Americas. They could just as well have used the words "Caribbean" or "American".

Today the term "Indian" is still being used — and it is still causing a lot of confusion. For example, the Constitution of Canada was amended in 1982 so that there are now four main references to "Indians" in the Constitution, one written in 1763, one in 1867, one in 1930 and one in 1982. Ever since 1982 people have wondered what the connection is among these four uses of the same word, as well as between them and the definition of "Indian" in the *Indian Act*.

The Four Indians of the Constitution

- The *Royal Proclamation* of 1763 is seen as the "Indian Bill of Rights" because it protected "Indians" and "Lands of the Indians". It required the consent of Indians where any changes to their rights were involved, and it made the rule that only the Imperial Crown, and not colonial or provincial governments, had jurisdiction for Indians and their lands. The Proclamation, issued by King George III, defined Indians in terms of the "Nations or Tribes of Indians with whom We are connected, and who live under Our protection" in all British Dominions and Territories in North America.

- Section 91(24) of the *Constitution Act, 1867* refers to "Indians, and Lands reserved for the Indians" as being an exclusive federal responsibility. It is consistent with the *Royal Proclamation*, with the federal government taking over many of the responsibilities of the Imperial Crown. The 1867 use of the term "Indians" is basically the same as the meaning that Columbus gave to it. It means "Aboriginal-Americans". Today this should include all Inuit, Métis, non-registered and status Indians alike.

- In 1930 the right of "Indians" of the Prairies to hunt, fish and trap for food at all times on unoccupied Crown lands was entrenched in the *Constitution Act, 1930*. Basically, the 1930 Constitution requires the Prairie provinces to guarantee to all "Indians" their rights to food harvesting on unoccupied Crown lands or on any other lands to which they have a right of access. Since the 1950s the provinces have, for convenience, restricted this right to "status Indians". This interpretation, despite some support in the lower courts, is wrong. Some people argue that "Indians" in the 1930 Act refers to the same people as "Indians" in 1867. Others argue that only "treaty Indians", whether status or non-status, have these rights.

  The NCC agrees that the 1930 and 1867 uses of the word "Indian" are the same. We believe that the only way to avoid violations of these constitutionally protected harvesting rights is for governments to negotiate agreements on implementing the 1930 Act right to hunt, fish and trap with Prairie Aboriginal people themselves (status and non-status). Only by the consent of these Aboriginal people can their rights be modernized and made real.

continued on next page...

The Four Indians of the Constitution (cont'd)

- In 1982 the word "Aboriginal" was put in the Constitution and defined as including the "Indian, Inuit and Métis peoples of Canada". So the meaning of "Indian" in the Constitution Act, 1982, is different than in the 1867 Constitution Act. The 1982 use of "Indian" refers to only some Aboriginal peoples who more commonly refer to themselves today as "Indians", even though they may actually be Cree or MicMac. The 1982 word "Aboriginal" is basically the same as the 1867 word, "Indian".

None of these four different Constitutional uses of the term "Indian" are the same as the *Indian Act* definition of who is and who is not entitled to be registered as a "status Indian" or a "band member". Many people who are Métis for the purposes of the 1982 definition of Aboriginal peoples also have entitlement to be registered as "Indians" under the Act and are "Indians" for purposes of the various Constitution Acts before 1982. Similarly, there are Cree bands in Alberta and MicMac bands in Newfoundland which are not "bands" under the Act and whose members are not therefore registered. These people are, nevertheless, Indians under the various Constitution Acts.

LATE NOTE

According to DIAND, as of December 17th, 1986, 17,751 persons had been registered, which indicates a significant improvement in the pace of registrations over the last several months. In addition, DIAND is currently involved in some 35,000 information searches relating to applications submitted.

PART II

KNOWING YOUR RIGHTS

Over the past year, it has become clear that many people are not having the rights they have acquired under C-31 protected adequately. In some cases, this is because DIAND officials simply interpret the Act to mean one thing when it probably means another. In other cases, some bands have done the same thing and denied reinstated or existing members the rights that C-31 provides. In addition, C-31 is sometimes so vague that nobody knows for sure how to interpret what it means or what rights it provides.

It is very important for people affected by Bill C-31 to know what their rights are. People must not just accept what they are told. People affected by C-31, which means almost all Indians and many Métis in Canada, must be on guard against misinformation or bad information. They must be able to recognize when someone is not respecting their rights. There are three simple rules to follow:

First: **Know Your Rights**
Second: **Get Everything in Writing**
Third: **Let Everyone Know of Your Rights**

In this section, the basic types of rights are summarized. For a more complete discussion of rights, especially concerning entitlement to registration, refer to Guidebook #1, which is available from the NCC and its affiliates. As with Guidebook #1, the relevant sections of the new *Indian Act* are referred to in brackets, for example: "(s.10)", which refers to section 10 of the Act.

Five Types of Rights to Protect

It is useful to divide the rights of potential applicants for registration into five different types, since the type of right involved will often determine how they should be protected.

1. Rights to Registration and Band Membership

This group of rights relates directly to who has entitlement to be registered under the new Act — either on the Indian Register or on a Band List. The "Protest and Appeals" clauses of the new Act discussed in the next part of this booklet relate directly to resolving issues over entitlement. The summary listing below gives some examples of the kinds of issues involved in protecting these rights:

- Can Membership Codes deprive a person of an acquired right to membership?

  No. If you are entitled to membership by C-31, then a band cannot deny you that right, even if the band has control over its membership code. The Act does say that band members can lose membership, but this can only happen for reasons or actions taken after the code is in effect. You can't lose membership simply because you were reinstated or because of some situation (like non-residence) that is related to your original loss of membership.

- Can acquired rights, such as to band membership, be lost because of delays in the registration process?

  Acquired rights cannot be lost because of delays in the registration process. It is not clear, however, what bands or DIAND will do in the case of people who reinstated with acquired rights to membership after codes are already implemented. The NCC is trying to sort this issue out with DIAND now and more information on this issue will be addressed in the next booklet.

- Does Bill C-31 reinstate all people who lost or were denied status, or only those identified under clauses specifically referred to in sections 6 and 11?

  The NCC believes that all sections of the old Indian Acts (from 1868 on to 1984) are covered by the phrase *"or any former provision of this Act relating to the same subject matter"*, found in all of the key entitlement sections in section 6. DIAND is beginning to change its original, restrictive interpretation on this matter to agree with the NCC position. But this means that people must be very careful that if they were reinstated or rejected before October of 1986, they should ask DIAND to review their application to make sure they obtain status under the correct entitlement section.

- What rights of compensation do people have if they lost or were denied registration before or after 1985 but were legally entitled to it?

  There is no clear answer to this issue. There is a "saving from liability" clause in Bill C-31 which tries to prevent anyone entitled under sections 6(1)(c), (d) or (e) from claiming compensation for loss of status and membership. However, it is clear that this exemption would not prevent someone entitled before 1985 (under s. 6(1)(a)) from seeking compensation. Similarly, the liability clause does not prevent someone from seeking compensation for wrongful denial of entitlement under the new Act. In fact, the NCC believes that the "saving from liability" clause is probably invalid anyway. Compensation could be

sought by someone for loss of rights because of the old *Indian Act*, but they would probably have to go to the courts to overturn the "saving from liability" clause and obtain compensation.

- Is DIAND obligated to interpret C-31 in accordance with the Supreme Court of Canada's rulings that require a fair and liberal interpretation of the Act in favour of the rights of Indian people?

  Some of DIAND's interpretations have led to people in the same family or generation being treated very differently, when other reasonable interpretations are possible that treat them equally. The previous decisions of the Supreme Court are very important because they mean that the government must interpret the Act liberally in favour of Indian rights. Government must not interpret the Act in a way so as to deny or restrict the rights of Indian people.

- What entitlement do people have now if they were entitled to registration before 1985, subject to protest, but did not attempt to be registered? Are they entitled under s.6(1)(a), or some other clause?

  NCC feels that all such people should have their status and band membership confirmed under s. 6(1)(a). NCC and DIAND have taken different positions on this issue and although DIAND seems to be changing its mind, the NCC has no evidence in writing of what DIAND's policy actually is. To date, we do know that some people in this situation have been registered under s.6(2) of the Act, which provides only status and not band membership, and does not allow for automatic status for the person's children.

All of these issues are still unresolved, since DIAND has taken one view where other interpretations are either possible or required. Unless there is agreement on interpretations, then many registrations and rejections will have to be protested and appealed to the courts.

2. Rights and Benefits of Status and Membership

These rights flow from either law (federal or provincial) or from federal programs designed for status Indians or for band members. They are the source of much controversy, especially since DIAND is not the only one involved in implementing them. Bands, provincial governments and other federal departments, such as Health & Welfare, Revenue Canada and Fisheries & Oceans, may also play a part in administering, and interpreting, these rights and benefits.

Summary of Statutory Rights and Program Benefits

- Federal Statutory rights (required by law)
  - Food fishing rights, as provided for under the *Fisheries Act* and Regulations (these are different in each province and territory and do not exist in P.E.I.).
  - General rights that flow from band membership, as set out in the *Indian Act*, such as the right to reside on reserve, to own or inherit real property, to vote in elections or participate in band code consents and to participate equally in federal or band delivered programs for members.
  - Exemptions from certain provincial laws while on reserve.
  - Income taxation exemption under federal law, basically for income earned on a reserve, and property taxation exemptions regarding reserve lands and certain goods.
- Federal program benefits (not required by law):
  - Un-insured health services program of Medical Services Branch, National Health & Welfare (e.g., covers special travel costs, dental, eye care, hearing aids, etc. not covered by provincial insurance schemes).
  - DIAND post-secondary education assistance program to cover the costs of Indians going to universities and colleges.
  - VIA Rail & BC Rail transportation discounts.
- Provincial benefits (some provinces only):
  - Free medical coverage.
  - Sales tax exemptions.
  - Gasoline and tobacco tax exemptions.
  - Right to special representation on school boards.

It is important to realize that there may be many problems involved in actually receiving these rights and program benefits. Some of them are provided for in C-31 and suffer the same problems of interpretation that rights to registration do. All of the laws and programs which provide for these rights and benefits were developed before C-31. Since C-31 introduced a totally new system of entitlement and split status away from band membership, there is controversy over how to interpret or implement pre-existing programs in the context of a new system of status and band membership. Some of the issues are:

- Who is entitled to participate in votes on membership codes?
- What is included in "band membership"? Does it include the right to reside on reserve? Can this right be restricted?
- Can delays in the registration process deny access to legal benefits, such as health and education benefits and tax exemptions?
- What are the dates to which different rights and benefits are retroactive (April 17, 1982; April 17, 1985; June 28, 1985; the date of a person's application, or some other date)?
- Do reinstated Indians not on a Band List have to get band support or sponsorship for accessing benefits when bands are the only ones administering these benefits now?
- Who has a right to reside on reserve for the purposes of holding or inheriting property on reserve?

In the case of rights under the *Indian Act*, we won't know how DIAND is interpreting all these issues until they enact regulations or publish clear interpretation bulletins, and this process is still only just beginning. The courts may have to clarify many of these rights, unless the Parliamentary review clarifies them first by proposing further amendments to the *Indian Act*. Furthermore, many other rights and benefits asserted over the years by status Indians have not been fully recognized by provincial and federal governments. They also remain as lingering issues.

3. Procedural Rights

The implementation of Bill C-31 involves a number of special procedures that have to be followed by the Registrar, the Minister, and by bands. If these procedures are not followed, then you and your rights may be affected. Listed below is a summary of the basic procedural requirements and some of the main issues involved:

A) The Registrar is required under sections 5 through 14.3 of the Act to carry out certain functions. What procedures must he follow when:

- investigating a request for registration, for example, involving a question of paternity?
- investigating a protest to the addition or deletion of a name on the Register or on a Band List?
- maintaining Band Lists, for example, after a band has taken control over its membership but where applications for registration were made before that time and not yet processed?

B) Bands must follow certain procedures in developing, consenting to and obtaining control over their membership systems (s.10):

- What constitutes a "consent"? Must the electors vote or can some other system be used? What system would custom bands have to use (there are 255 bands that do not follow the Act's voting system)?

  The NCC feels that for Band Code consents, **an "elector" is any person on the Band List over 18 years old. Normal residence on reserve is not required**. Custom bands do not always have "votes" and may follow any system of consent that is customary. However, all persons on the Band List over 18 must be allowed to participate in whatever system is used.

- C-31 requires two different "consents", namely: a) one to approve the intention to take control over membership, and b) one to approve the precise membership rules for that band. In addition, a by-law under section 81(1)(p.4) may be passed to allow all adult members of the band, whether or not they are on the Band List, to participate. This would allow for reinstating members who are not yet registered to participate.

- "Appropriate notice" is required to be given of the intention to assume control over membership and for passage of the rules themselves. What is "appropriate notice"? Who must be given notice or provided the opportunity to review the proposed Code?

  The NCC feels that **"appropriate notice" means written notice** of the proposal to assume control and of the membership code being proposed, at least 30 days in advance of the consent being sought (in a meeting or in some other way). **All persons on the Band List over 18, and all people eligible for registration that are known to the band should be given notice.**

- Must a membership code include a mechanism for reviewing or appealing decisions made on membership? C-31 seems to encourage this, but it may not be required. What Courts have jurisdiction to hear appeals from membership codes even when no review mechanism is provided for in the Code?

C) The Minister is required to make sure that the procedures that bands are supposed to follow in passing their membership codes are in fact followed before he transfers control over the band's membership system:

- What procedures must the Minister follow to insure that the band has met the conditions required in the Act? Must he notify band members in case of non-compliance? If the conditions are not met as required, what procedures does the Minister, and the band, follow to rectify any mistakes? Can the Minister

"delay" or "refuse" consideration of a band's membership code? Or can only the courts determine compliance?

- Band Membership Codes are supposed to be made public by the Minister by being "gazetted" (published in the official Canadian Government notices, called the Canada Gazette). To date no code has been gazetted, even though a year has passed since the first code was allowed. Has there been a violation of any rights?

Except for violations of procedure by the Registrar, which can be reviewed under the "Protest and Appeals" clauses of C-31, these issues may have to be taken directly to court for resolution unless an acceptable interpretation is agreed to, or unless Parliament amends the *Indian Act* again to clean up the confusion resulting from C-31.

4. Protection From Discrimination

Sexual discrimination under the old *Indian Act* was stated as one of the main reasons for changing it. However, C-31 has not ended all forms of sexual discrimination, and other forms of discrimination may exist.

There are two basic questions to be answered if someone thinks discrimination is being allowed under the Act, namely:

- Is the Act actually discriminatory, or is it just being improperly interpreted by officials?

- If the Act is discriminatory, is this constitutionally allowed?

In the first case, a protest or an appeal under the new Act (section 14) may resolve the problem. In the second case, the Act itself may have to be challenged in the courts as being unconstitutional.

There are two basic types of potential discrimination that arise from the new Act:

Sexual Discrimination

- Although C-31 attempted to eliminate the idea of illegitimacy, in fact illegitimate daughters of male Indians and illegitimate children (male and female) of female Indians are being treated differently under the Act than illegitimate sons of male Indians. The interpretation of the Act that leads to this unequal treatment may be wrong, as the NCC believes, or it may be right, in which case part of Bill-31 may be unconstitutional as violating section 15 of the *Charter of Rights and Freedoms*.

- Sexual inequality is allowed under the Act in a second way. Children of women who lost status under the old section 12(1)(b) are generally only entitled to status, and not to band membership

under C-31. However, the children of a male Indian and a non-Indian woman who gained status under the old section 11(1)(f) are entitled to both status and band membership. The result is that the man's grandchildren are guaranteed status while the woman's are not. This seems to be clearly called for in Bill C-31, but it may very well be unconstitutional as violating section 15 of the *Charter of Rights and Freedoms*.

Discrimination on other grounds:

- Generational discrimination: The "second-generation cut-off" rule in C-31 results in tens of thousands of people not having a right to status or membership. In addition to a possible violation of the Charter, this rule probably violates article 27 of the *International Covenant on Civil and Political Rights*. The long term effect of this cut-off rule may be the ultimate termination of status Indians in several generations.

- Discrimination on the basis of age: Illegitimate children (discussed above) may also be having their Charter rights violated by discrimination due to age, since their status may also depend in part on their date of birth (pre-1951; between 1951 and 1956; and after 1956).

- Discrimination against "half-breeds": It appears that all classes of people who were subject to being enfranchised under the old legislation are entitled to reinstatement, except for those people who lost status for being linked to the "half-breed" scrip system. This may be unconstitutional under section 15 of the Charter as a violation of the equal benefit of the law without discrimination, especially since many persons who took "scrip" later had their status confirmed if they were on Band Lists as of 1958.

In the case of discrimination against illegitimate children, a person who feels his or her rights to registration have been wrongly interpreted can use the "Protest and Appeals" sections of C-31 to try and have a decision of the Registrar overturned. Where the *Charter of Rights and Freedoms* is involved, then the person would have to take the matter directly to the courts.

5. Aboriginal and Treaty Rights

One of the "hidden" changes made by C-31 is the effect it has on access to rights that have an independent basis in Indian, Treaty, Aboriginal or Constitutional law, separate from entitlement under C-31 or under other federal legislation linked to the *Indian Act* system. The problem is that governments, including provinces, have tended to use the Act and the registration system as a way of administering the distribution of Treaty benefits or access to Aboriginal and Treaty rights. However, the *Indian Act* has never linked status to Treaty or Aboriginal rights, and since at least 1982, Aboriginal and Treaty rights have been protected in the Constitution against federal or provincial laws.

Because C-31 splits the notion of status from band membership, many people have begun to notice how access to Treaty and Aboriginal rights can be affected by the *Indian Act*. What is important to remember is that the *Indian Act* has never claimed to be able to limit or restrict these rights. There are, generally speaking, three broad types of rights involved:

- Treaty rights under pre- and post-Confederation Treaties, including treaty harvesting rights.
- Aboriginal rights (generally defined through either land rights negotiations or in the Constitutional talks now underway).
- Other Constitutional rights, like food harvesting rights of "Indians" in the Prairies under the *Constitution Act, 1930.*

Governments have not yet changed their practice of viewing the Act as somehow controlling access to these rights. Most provinces still prosecute non-status Indians who are exercising their Treaty or Aboriginal harvesting rights. This is probably contrary to the law; yet it still happens. Unless governments, both federal and provincial, are willing to amend their own laws and policies, in negotiations with Aboriginal people, then the imposition of the *Indian Act* system on access to these Constitutional rights should be challenged.

Special Note for "Red Ticket" Holders

From 1869 until 1951, Indians who became enfranchised, especially Indian women who lost band membership upon marrying a non-registered Indian or a non-Indian, were still entitled to share in the annuities, rents and interest moneys of their former band, despite no longer being band members. In many cases, these people were given "red tickets". They could "commute" their rights in exchange for a lump sum payment based on ten or twenty years worth of Treaty annuities or band revenue payments by handing in their "red ticket". Otherwise they were entitled to continue to get their annual payments under Treaty or from band revenues.

The NCC feels that if you were affected by this system, it is very important that you **not** allow DIAND officials or band officials to attempt to "commute" your rights now or in the future. To commute your rights may effect your entitlement under Treaty in the future. If you have not been receiving your annual annuity payments, then what you should do is to notify DIAND that these are owing back to the last date on which such payments were received (usually the year before enfranchisement).

A special bulletin on this issue will be released in the near future by the NCC to provide more specific guidance for those individuals affected.

The "Protest and Appeals" provisions of C-31 are generally not relevant to solving the issue of conflict between legislation like the *Indian Act* and access to Constitutional rights, whether they are rights set out in the *Charter of Rights and Freedoms*, Aboriginal and Treaty rights guaranteed in s.35 of the *Constitution Act, 1982*, or some other right. Individuals or groups must normally take these matters directly to the courts, either at the federal court level (in the case of challenging the *Indian Act*), or at the provincial court level in the case of provincial legislation.

Walter Twinn et. al. versus The Queen

In the Spring of 1986, six Indians from Alberta started a court action to overthrow all of the membership and reinstatement sections of Bill C-31. Walter Twinn (Chief of the Sawridge Band) and five others are seeking in effect to have the *Indian Act* as it read in 1982 restored, along with section 12(1)(b) and all the other sections of the Act that C-31 did away with. They are arguing that only pre-C-31 status Indian band members have Treaty or Aboriginal rights. They are also arguing that loss of status under the *Indian Act* amounts to loss of all Treaty or Aboriginal rights.

The Native Council of Canada has decided to fight this challenge to Indian rights, since the limited gains made under C-31 and the Treaty and other rights of Indian people everywhere are threatened, not only by the arguments raised by Walter Twinn but also by the Department of Justice, which in fighting the Twinn case is also seeking to limit and deny Treaty and Aboriginal rights.

This part of the booklet has raised many questions and provided only some answers. The full answers can only be worked out by Aboriginal people, who must then convince governments to respect their rights. This means that Aboriginal people must defend their rights. The rights of Aboriginal peoples are far too important to be left solely in the hands of governments. It is up to Aboriginal people to protect their rights. No one else will do it.

PART III

PROTECTING YOUR RIGHTS

There are several ways for you to protect your rights if you believe they are being denied or restricted. In the case of many Aboriginal and Treaty rights, there is so much dispute about what these rights are that governments often simply ignore them or try to restrict access to them. Aboriginal leaders in Canada are presently addressing some of these issues in the Constitutional discussions with the federal and provincial governments. Aboriginal groups are also seeking the recognition of their rights through land claims negotiations and in attempts to address Treaty rights on a comprehensive basis.

However, rights often have to be protected in the courts as well. This is especially true of rights under the *Indian Act*, such as rights to registration, to band membership, and to related rights such as residency. The burden of protecting these rights usually rests with the individual fighting decisions of governments in the courts. This part of the Guidebook provides basic information on how individuals and groups can protect their rights through the process of litigation, or by "protecting your rights in court".

First Steps: Making Your Rights Known

The first and most important step to protecting your rights is letting other people know that you care about your rights and are willing to stand up for them.

The key is to make your rights known. In some cases, this does not require going to court at all. Governmental officials are sometimes simply ignorant of your rights but, once informed, they will respect them. In other cases, officials in a bureaucracy as big as DIAND might simply try to avoid recognizing or protecting your rights, even when it is clearly required in law, because they don't want to change the old way they have always done things, or because Ministers will not give them clear instructions to do so. Again, making your rights known, loudly and clearly, can often lead to governments changing the way they do things so that your rights are respected.

However, sometimes making your rights known requires going to court. Many Aboriginal people are nervous about doing this. The courts are, after all, made up almost entirely of non-Aboriginal people. But as Sandra Lovelace, Jeannette Lavalle, James Simon and the Musqueum band have shown, all it takes is for one person or community to be willing to stand up for their rights in court to lead to major changes in the law benefiting all Aboriginal people.

Protests Under the Indian Act

Section 14.2 of the new *Indian Act* sets out a procedure for individuals, or bands, to protest the inclusion, addition, ommission or deletion of a person's name from the Indian Register (which is the general list of all status Indians) or a Band List that is maintained in the Department. You can also appoint someone to act on your behalf in pursuing a protest under the Act.

A protest is basically a challenge that is made to an action taken by the Registrar, and can be made at any time someone is registered, denied registration, put on a Band List, or struck off either a Band List or the Indian Register. If you are simply unsure as to whether or not your name is included on the Register or on a Band List maintained by DIAND, then you or your representative merely needs to write the Registrar. He is required by s.14.1 to investigate and then to inform you of the results of his inquiry.

Protests can be made for a number of different reasons and by different people:

1. Protesting the kind of entitlement granted by the Registrar:

   You or your representative can file a protest if you think that the Registrar made a mistake in the kind of status you received. For example, if you were registered under section 6(2) but feel that you are entitled to be registered under section 6(1), then you can make a protest. Similarly, if you are entitled to have your name put on a Band List but this has not happened, then this ommission can be protested as well.

2. Protesting a rejected application for registration:

   If the Registrar rejects your application for registration, you or your representative can also protest that exclusion and require the Registrar to investigate the matter.

3. Protests by Others:

   A band or a band member may only protest your addition to, or ommission from, a Band List maintained by DIAND, and they must provide some specific reason for doing this. Bands or band members cannot simply hold up or delay reinstatements by using the protest sections of the Act. They must show specific reasons in each case, and only after a decision concerning the Band List has been made by the Registrar. They can not protest if you are added to the Indian Register.

Getting the Registrar to "review" your case

Sometimes the Registrar will review a rejected application form or the kind of entitlement involved without you having to file a formal protest. This is especially true if you provide new information on your situation.

A review can be to your advantage since it gives you an extra chance to persuade the Registrar to re-open your case and make a new ruling. When a protest is officially made, the Registrar must give an official decision, which can only be overturned by the courts.

Because C-31 allows for so many applications for registration, in many cases a junior official, without adequate training, may have made a mistake in your case. Asking the Registrar to review a registration or a rejection, expecially if you provide additional information, may save you having to go through the formal procedure of a protest or going to court.

The following summarizes the basic procedure involved in a formal protest under the Act:

A. Some action is taken by the Registrar. He either adds, deletes or omits to add a name to either the Indian Register or a Band List maintained in the Department. This action is really taken by a junior official but it is done in the name of the Registrar with his approval.

B. In order to protest the action, the person affected (or the band or any band member in the case of a decision affecting the Band List maintained by the Registrar) must **notify the Registrar, in writing, within three years** of the action by the Registrar. The notice of protest must contain a short statement of the reasons or grounds for the protest. There is no official protest form. All that is required is a letter. However, be sure to send your notice of protest by **registered mail**. Of course, you should also obtain the help of a lawyer in preparing a protest. **Remember** - you must file your protest within 3 years of the date of the Registrar's decision (that is, the date of his letter to you containing his decision).

C. The Registrar will investigate the protest, usually by meeting with the person protesting and any other person he thinks has information important to the case. This is a formal, legal process, so the Registrar will normally have transcripts made of the investigation proceedings. Most importantly, **the person making the protest must prove the reasons for the protest**. The Registrar does not have to prove why the action being protested was correct in his view. The person making the protest must

prove why the action was not correct. In conducting a protest investigation, the Registrar must follow certain rules of "Natural Justice" and it is important for you to make sure that these rules are followed (see box below).

D. The Registrar will make a **formal decision** in writing. The decision will either be to uphold his earlier action or to change it, for example by registering a person under a different section of the Act. The Registrar must communicate his decision, and the reasons for his decision, to all affected persons and groups.

Rules of Natural Justice

In responding to a protest under section 14.2 of the new Act, the Registrar must conduct an investigation into the matter to discover all relevant facts (s.14.2(5)). The courts have previously ruled that the Registrar is acting in a "quasi-judicial" capacity when he is deciding to add or delete someone's name to the Indian Register or a Band List. This means that he should follow certain basic rules of natural justice. The person affected by the protest should have the following basic rights:

- The right to a hearing before the Registrar with appropriate written notice of the hearing in advance;
- The right to be heard (not just be a witness or an observer);
- The right to know the case against him or her (that is, to know all essential information and evidence and to examine all documents);
- The right to present evidence whether admissible in a court of law or not (such as oral or "hearsay" testimony);
- The right to cross-examine any witnesses and call his or her own witnesses; and
- The right to be represented by legal counsel.

The Registrar must be completely impartial both in conducting the hearing and in rendering his decision. He must also be free from any reasonable apprehension of bias (which means he must not appear to be defending anyone's special interests, including his own or DIAND's).

Appealing a Decision of the Registrar

Section 14.3 of the new *Indian Act* allows a decision of the Registrar, made after a protest is filed, to be appealed to the courts. **Unless an appeal is made within six months of the decision on a protest, the decision of the Registrar is final and can not be overturned**. The following points summarize the basic process involved:

- A legal appeal to the courts must be filed within six months of a decision being made by the Registrar as a result of a protest. The appeal is filed with the appropriate court listed in s.14.3(5) of the Act within your province or territory.

- The person appealing a decision of the Registrar must notify the Registrar of the appeal immediately and provide a copy of the notice of appeal. The Registrar is then required to give the court copies of his decision, all documents considered during the protest investigation and any recording or transcript of the hearing.

- The Court can then do two things. First, it can choose to uphold, change or reverse the decision of the Registrar. In this case, the person involved can appeal the Court's decision to a higher Court if he or she is not satisfied with the lower court's decision.

  Secondly, the Court can instruct the Registrar to reconsider his decision or to make a further investigation. In the case where this still doesn't satisfy the person involved, then he or she would appeal again back to this same court on the basis of the Registrar's "reconsidered" decision.

Getting Legal Advice and Assistance

The Native Council of Canada and its affiliates are attempting to help individuals and communities to defend their rights. The Native Council of Canada has formed a Litigation Committee to try and advise individuals and groups who feel their rights are not being protected or respected.

If you or your community face a denial of rights, we encourage you to contact the Native Council of Canada affiliate in your area (see back cover). They will be able to assist you and they will help in such matters as finding knowledgable legal counsel.

Getting Financial Support for Litigation

There are several special funding sources for people considering using the courts to defend their rights. These sources provide individuals and groups with financial assistance to hire legal advice and cover court costs, although these programs have limitations and restrictions on the amount of funding available or the type of case involved.

1. DIAND Indian Test Case and "C-31" Litigation Funds:

This Program is geared toward providing funding for legal costs arising from cases that raise new and important legal arguments that will affect status Indians, bands, Aboriginal and Treaty rights and the interpretation of the *Indian Act*. Since C-31, this program has been expanded to include both "general" test cases and "C-31"

cases. The general test case fund has a small budget of $300,000 per year. Funding is normally limited to appeals from lower court rulings, although exceptions may be made.

With Bill C-31, the Minister of Indian Affairs made a commitment to seek $3 million specifically for test case funding for C-31 cases over the next few years. It is not yet clear whether the C-31 litigation fund will be bound by the same rules that govern the general test case fund. For example, the C-31 fund should probably cover legal costs for important protests and appeals under section 14.2 of the new Act. Also, the fund should be able to cover court costs from the start of the case (at the trial level), and not just for appeals from lower court rulings.

For further information contact:

Ms. Laurel Clow
Legal Liaison & Support Directorate, Department of Indian Affairs
Postal Address: Ottawa, Ontario K1A 1H4
Telephone: (613) 994-4072

2. "Court Challenges" Program

The Canadian Council on Social Development, a private non-profit organization, has been given responsibility to administer a new "Court Challenges" program for the federal government. This program provides funding support for selected test cases that address constitutionally based language and equality rights issues. The program is devided into two areas, with the equality rights area receiving about $7.5 million over the next five years. The equality rights fund is to cover legal costs at trial or appeal courts in cases which test the legislation, policies or practices of the federal government that appear to contravene sections 15, 27 or 28 of the *Canadian Charter of Rights and Freedoms*. These sections, especially section 15, are very important to Indian people since the *Indian Act* still may be discriminating against people for reasons that are prohibited under sections 15, 27 or 28 of the Charter, as described earlier in this booklet.

For further information, contact:

Mr. Richard Goreham, Co-ordinator, Court Challenges Program
Canadian Council on Social Development
55 Parkdale Avenue, Ottawa, Ontario K1Y 4G1
Telephone: (613) 728-1865

End Note

In all cases where you are thinking about taking legal action to protect your rights, you should keep your local and regional representative associations informed (see back page for a listing of associations).

The NCC and its affiliates would also appreciate hearing from anyone experiencing any problems in accessing their rights or in having their rights or benefits respected. The NCC and its affiliates are always ready to help you protect your rights.

Remember — the protection of Aboriginal, Treaty and other rights is a sacred one that we are all responsible for. The rights of our children and their children will be safe-guarded only if we, in this generation, stand up for and protect our rights as Indian, Inuit and Métis people.

Between now and June of 1987, when Parliament will be reviewing the effects of Bill C-31 for possible further amendments to the *Indian Act*, the NCC will be publishing further booklets and bulletins to help keep you informed. Please contact us, or the NCC affiliate in your area, for further information or if you wish to provide us with your views on how the *Indian Act* should be changed.

Where To Get Information and Assistance

1. Provincial and Territorial Affiliates of the NCC

Council of Yukon Indians
22 Nisutlin Drive
Whitehorse, Yukon Y1A 3S5
(403) 667-7631

United Native Nations
1682 West 7th Avenue
Vancouver, B.C. V6J 4S6
(604) 732-3726

Indian Council of First Nations of Manitoba
Suite 202, 460 Main Street
Winnipeg, Manitoba R3B 1B6
(204) 943-0309

Native Alliance of Quebec
21 Brodeur Street
Hull, Quebec J8Y 2P6
(819) 770-7763

Native Council of Prince Edward Island
33 Allen Street
Charlottetown, P.E.I. C1A 2V6
(902) 892-5314

Federation of Newfoundland Indians
P.O. Box 375 St. Georges,
Newfoundland A0N 1Z0
(709) 647-3733

Métis Association of the NWT
P.O. Box 1375
Yellowknife, NWT X1A 2P1
(403) 873-3505

Native Council of Canada (Alberta)
Suite 230, 10525 Jasper Avenue
Edmonton, Alberta T5J 1H4
(403) 424-0830

Ontario Métis and Non-Status Indian Association
369 Queen Street East, Suite 202
Sault Ste. Marie, Ontario P6A 1Z4
(705) 949-5161

Native Council of Nova Scotia
P.O. Box 1320, Abenaki Road
Truro, Nova Scotia B2N 5N2
(902) 895-1523

New Brunswick Aboriginal Peoples Council
320 St. Mary's Street
Fredericton, N.B. E3A 2S5
(506) 472-0982

Labrador Metis Association
P.O. Box 599, Station "B"
Happy Valley, Goose Bay
Labrador A0P 1E0
(709) 896-8193

2. Department of Indian Affairs

An information "Hot-Line" (toll-free telephone service) has been set up by DIAND to answer questions.

1-800-567-9605

This line is available Monday through Friday from 7:30 a.m. to 5:00 p.m. (Eastern time). Do not expect an answer right away since the operator will just take your number and one of the DIAND officials will call you back.

University of Alberta Library
0 1620 0328 6570

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The **Native Council of Canada** (NCC) has represented Métis and non-status Indian peoples since 1971 at the national level, and has played a leading role over the past 15 years in the fight to amend the *Indian Act*. Since passage of Bill C-31, the NCC's representation of Indian people has expanded to cover the concerns of both it's non-registered and registered members.

The NCC is made up of twelve Provincial and Territorial Organizations which directly represent approximately one million Indian and Métis people in Canada. The NCC's Provincial and Territorial affiliates are involved in addressing Bill C-31 and related issues such as Treaty and Aboriginal rights and will provide help to Indian and Métis people requiring assistance or information on the new *Indian Act*.

This booklet is the second in the **"C-31: The New Indian Act"** series being published by the Native Council of Canada to provide information and guidance to those affected by changes to the *Indian Act*.

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